

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: U S WEST COMMUNICATIONS, INC., n/k/a QWEST CORPORATION	DOCKET NOS. INU-00-2 SPU-00-11
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**CONDITIONAL STATEMENT RECONSIDERING
BOARD CONDITIONAL STATEMENT REGARDING
AUGUST 20, 2001, REPORT**

(Issued May 9, 2002)

On February 10, 2000, the Utilities Board (Board) issued an order initiating an investigation relating to the possible future entry of U S WEST Communications, Inc., n/k/a Qwest Corporation (Qwest), into the interLATA market. The investigation was identified as Docket No. INU-00-2.

A report was filed with the Board on August 20, 2001, by The Liberty Consulting Group (Liberty) that addressed the multistate collaborative review of Qwest Corporation's (Qwest) compliance with the following checklist items:

- Item 2: Unbundled Network Elements (UNEs)
- Item 4: Access to Unbundled Loops
- Item 5: Access to Unbundled Local Transport
- Item 6: Access to Unbundled Local Switching

On December 21, 2001, the Board issued its Conditional Statement Regarding August 20, 2001, Report (Conditional Statement).

One component of Checklist Item 5 is Qwest's obligation to provision enhanced extended links – or EELs. EELs are unbundled network element (UNE)

combinations of loop and interoffice transport. The combination of loop and transport is meant to reduce competitive local exchange carrier (CLEC) costs. It allows transporting of traffic to a collocation in a different wire center. The Board's Conditional Statement, on pp. 60-64, addressed disputed EEL Issue 3, Waiver of Termination Liability Assessments for EELs.

AT&T's position was that incumbent local exchange carriers (ILECs) were obligated to provide UNE combinations, such as EELs, beginning August 8, 1996, the date of the FCC's *Local Competition Order*. Qwest, however, refused to provide the combinations until recently. Therefore, if AT&T wanted a loop and transport combination, it had to order special access circuits. Qwest now provides EELs, but in order to convert the special access circuits to EELs, CLECs are subject to termination liability assessments (TLA). AT&T argued that all TLAs should be waived for special access circuits that qualify for conversion to EELs.¹

Qwest maintained that the obligation to provide EELs did not occur until after litigation over the FCC's *Local Competition Order* was settled. Prior to that, CLECs could purchase special access circuits under contract. If a CLEC chose to cancel a contract, however, TLAs would apply if the CLEC had received long term or volume discounts. Qwest saw the CLECs as unwilling to pay the TLAs even though they had received discounted rates. Nevertheless, to resolve the issue, Qwest proposed a compromise to waive TLAs under certain circumstances.²

¹ See AT&T's Brief Regarding Checklist Items 2, 5, and 6, filed May 30, 2001, pp. 48-49.

² See Qwest's Brief Regarding Checklist Items 2, 5, and 6, filed May 31, 2001, pp. 28-30.

In proposing a resolution to the issue, Liberty adopted parts of Qwest's compromise, which waived TLAs for conversions if the special access circuits had been ordered between February 17, 2000, and May 16, 2001. February 17, 2000, was the effective date of the FCC's *UNE Remand Order*. May 16, 2001, was the date of Qwest's TLA waiver compromise. Liberty's resolution also contained a third date - November 30, 2001. This was the date that CLEC's must identify to Qwest any circuits they believed qualified for the TLA waiver.³

AT&T filed comments reiterating that ILECs were obligated to provide EELs as of August 8, 1996. It was AT&T's position that no TLAs should apply when special access circuits ordered after August 8, 1996, were converted to EELs.⁴

The Board, in its Conditional Statement, approved Liberty's resolution of the issue except for the February 17, 2000, date. On this point, the Board agreed with AT&T and substituted August 8, 1996, the date of the FCC's *Local Competition Order*.⁵ The decision precluded Qwest from charging TLAs for conversions of special access circuits ordered after August 8, 1996.

On January 11, 2001, Qwest filed comments on the Board's conditional statement.⁶ Qwest argued that its compromise proposal actually exceeded what the law or the FCC required. To support its position, Qwest referenced the January 9, 2002, *Net2000 EEL Order*, issued subsequent to the Board's conditional statement,

³ See Liberty's *Unbundled Network Element Report*, dated August 20, 2001, pp. 84-87.

⁴ See AT&T's Exceptions and Comments on Workshop Three Unbundled Network Element Report, filed August 30, 2001, pp. 67-67.

⁵ See *Conditional Statement Regarding August 20, 2001, Report*, Docket Nos. INU-00-2 and SPU-00-11, issued December 21, 2001, pp. 60-64.

in which the FCC treated the application of TLAs as appropriate.⁷ Qwest argued that the Board was wrong to extend the obligation to provision EELs back to August 8, 1996. Qwest drew upon the following chronology and facts listed in the *Net2000 EEL Order* to support its position:

- 47 C.F.R. § 51.315(b) states that "an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines."
- However, the implementation of rule 51.315(b) was stayed, and the rule was subsequently vacated by the Eighth Circuit in *Iowa Utilities Board v. FCC*.
- The U.S. Supreme Court reversed the 8th Circuit in *AT&T Corp. v. Iowa Utilities Board* and reinstated rule 51.315(b) in 1999.
- In the same case, the Supreme Court also vacated rule 51.319, which identified the network elements ILECs were required to provide as UNEs.
- After the Supreme Court case, there was no list of UNEs that Qwest was required to provide until the FCC's *UNE Remand Order*, which became effective on February 17, 2000.
- The *UNE Remand Order* was the first occasion that EELs were identified or mentioned by name.
- In the *Net2000 EEL Order*, the FCC did not attach the EEL obligation back to the 1996 *Local Competition Order*.
- The FCC also rejected Net2000's request to convert special access circuits to EELs as of the date of the *UNE Remand Order*. Thus, Qwest's proposed date of February 17, 2000, goes beyond what is legally required.

⁶ See Qwest Corporation's Comments to Iowa Utilities Board's Conditional Statement Regarding August 20, 2001, Report, filed January 11, 2001.

⁷ *In the Matter of Net2000 Communications, Inc. vs. Verizon – Washington, D.C., Inc., Verizon – Maryland, Inc., and Verizon – Virginia, Inc.*, FCC 01-381, File No. EB-00-018, p.12 (Released January 9, 2002) ("*Net2000 EEL Order*").

On January 24, 2002, AT&T filed a response to the EEL/TLA comments filed by Qwest.⁸ AT&T argued the Board's decision was correct because an EEL is a combination to two UNEs – loop and interoffice transport. The Section 271 Competitive Checklist specifically requires Qwest to provide loops and transport. Even though the Supreme Court remanded the FCC's original list of UNEs, Section 271 continues to obligate Qwest to provide loops and transport. The Supreme Court's reversal of the Eighth Circuit's decision on the validity of rule 51.319(b), requiring UNEs to be provided in existing combinations effectively expunged the Eighth Circuit's decision. The reversal rendered the rule effective as of the date it was originally enacted. Qwest, therefore, has been obligated to provide existing combinations of loops and transports since August 8, 1996.

The 1996 *Local Competition Order* identified loops and transport as unbundled network elements. In addition, the FCC adopted rules, 51.315(c) – (f), which require ILECs to combine unbundled network elements in any manner. The Eighth Circuit, however, overturned those rules, plus rule 51.315(b). Rule 51.315(b) states that an ILEC shall not separate the network elements that the ILEC currently combines. The Supreme Court later reinstated rule 51.315(b). In light of the Supreme Court's decision, the FCC asked the Eighth Circuit to reinstate its UNE combination rules - 51.315(c) – (f).⁹

⁸ See AT&T's Response to Qwest Comments on the Board's Conditional Statement Regarding August 20, 2001, Report filed January 24, 2001.

⁹ See *UNE Remand Order*, released November 5, 1999, at paragraph 475.

When the *UNE Remand Order* was issued, the Eighth Circuit was still deciding whether the UNE combination rules, 51.315(c) – (f), should be reinstated. Thus, in that order, the FCC declined to define the EEL as a separate network element.¹⁰ Nevertheless, because the separation rule, 51.315(b), had already been reinstated, the FCC ruled that ILECs were prohibited from separating loop and transport elements currently combined and purchased through special access tariffs. The FCC also ruled that requesting carriers were entitled to "such existing loop-transport combinations at unbundled network element prices."¹¹

Later the FCC amended this decision because of concern that interexchange carriers (IXCs) could use EELs solely to provide exchange access service. Thus, IXCs could avoid paying access charges by converting their existing special access circuits to UNE pricing. Such conversions would force incumbent LECs to increase local rates and undermine universal service. Therefore, in its *Supplemental Order*, the FCC created constraints to insure conversions were being used to provide a "significant amount of local exchange service."¹²

Later yet, in the *Supplemental Order Clarification*, the FCC defined more precisely the "significant amount of local exchange service" threshold for converting special access circuits to EELs. In that order, the FCC created three "safe harbor" scenarios that must be met for the conversions.¹³

¹⁰ See *UNE Remand Order* at paragraph 478.

¹¹ See *UNE Remand Order* at paragraph 480.

¹² See *Supplemental Order*, released November 24, 1999, at paragraph 2.

¹³ See *Supplemental Order Clarification*, released June 2, 2000, paragraph 22.

One ruling in the *Net2000 EEL Order* addressed Verizon's obligation to convert circuits retroactively to the date of the *UNE Remand Order*. The FCC ruled that there was no basis for the claim that all special access circuits "be re-priced from the effective date of the *UNE Remand Order*." ILECs were under "no obligation to provide conversions unless such conversions were requested."¹⁴

A second ruling in the *Net2000 EEL Order* addressed the appropriateness of TLAs when special access circuits were converted. Because some of the TLAs would be "relatively large," the FCC ruled it was "reasonable for Verizon to request that Net2000 confirm that it wished to go ahead with the conversions before implementation."¹⁵

The FCC rulings in the *Net2000 EEL Order* support Qwest's contention that the obligation to convert special access circuits to UNE pricing did not exist prior to the *UNE Remand Order*. The FCC's rulings also support the validity of TLA charges when ILECs convert special access circuits to UNE pricing. Therefore, the following two date changes appear appropriate for SGAT section 9.23.3.12:

Qwest will waive any TLA charge otherwise applicable under the agreement or Tariff election by which a CLEC ordered or augmented a special access circuit under interstate Tariff between ~~August 8, 1996~~ February 17, 2000 and May 16, 2001, provided that CLEC identifies and communicates in writing to Qwest on or before November ~~30, 2004~~ May 31, 2002, each circuit it believes to qualify hereunder. Nothing herein shall be construed as expanding the rights otherwise granted by this SGAT or by law to elect to make such conversions.

¹⁴ See *Net2000 EEL Order*, at paragraph 32.

¹⁵ See *Net2000 EEL Order*, at paragraph 35.

The first date reflects the effective date of the *UNE Remand Order*. The second date was originally proposed by Liberty, but the Board did not rule on Liberty's proposal until its December 21, 2001, Conditional Statement. By changing its earlier ruling, fairness requires CLECs be given additional time to notify Qwest about circuits that may qualify for conversion.

SUMMARY

Assuming Qwest incorporates the change to its SGAT as set forth above, verbatim, the Board is prepared to indicate at this time its conclusion that Qwest has conditionally satisfied each of the checklist requirements addressed in the August 20, 2001, report, subject to the same limitations noted in its December 21, 2001, conditional statement related to other proceedings and processes.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 9th day of May, 2002.